IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

No. 97-2109-G/A

JIM WHITEHORN, Executor of the Estate of Angula Wilson Whitehorn Turner,

Plaintiff,

vs.

JACK R. WHITEHORN and LOUIS R. KOMLOSE,

Defendants.

ORDER GRANTING DEFAULT JUDGMENT

FILED NOVEMBER 4, 1998

This case was set for trial on October 26, 1998. Based on defendants' failure to appear for trial, the court directed entry of default in this matter and heard proof as to what relief might appropriately be awarded plaintiff. Based on the evidence presented and the entire record in this case, the court directs as follows:

1. The Contract for Conveyance and Quitclaim Deed to Indemnify recorded in the Register's Office of Tipton County, Tennessee, in Book 781, Page 190, is rescinded and is of no effect and null and void; and

2. The receiver appointed in this matter, Judy Barkelew, Clerk and Master of the Chancery Court of Tipton County, Tennessee, shall file a report in this cause within fifteen days of this order and, upon confirmation by this court of such report, shall distribute all funds in the receivership to the executor of the Estate of Angula Wilson Whitehorn Turner and shall be discharged from any further duty and liability in this matter.

IT IS SO ORDERED.

s/Julia Smith Gibbons
Julia Smith Gibbons
United States District Judge
November 4, 1998

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-6635

HUGH C. TURNER, JIM WHITEHORN, Co-executors of the Estate of
Angula Wilson Whitehorn Turner,

Plaintiffs-Appellees,

vs.

JACK R. WHITEHORN and
LOUIS R. KOMLOSE,

Defendants-Appellants.

ORDER

FILED DECEMBER 21, 1999

Before: Jones, Batchelder, and Moore, Circuit Judges.

Jack R. Whitehorn and Louis R. Komlose, proceeding pro se, appeal a district court order entering default judgment against them on the plaintiffs' state law fraud complaint originally filed in the Chancery Court of Tipton County Tennessee. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

This case involves a family dispute, which arose after the death of a parent, over ownership rights to certain real property. Hugh C. Turner and Jim Whitehorn, co-executors of the estate of Angula Wilson Whitehorn Turner (decedent), filed this lawsuit, essentially claiming that the defendants conspired to defraud the decedent and her estate, and that Jack Whitehorn had breached his fiduciary duty to the decedent. The defendants removed the action to federal court based on the diversity jurisdiction. Subsequently, the district court denied the defendants motion for summary judgment. Prior to the ruling on the motion for summary judgment, the court granted the estate's motion to amend its pleadings, and the estate filed an amended complaint. The defendants moved to dismiss the case, pursuant to Fed. R. Civ. P. 41(b), alleged that the amended complaint was defective and that the plaintiffs had not properly served the amended complaint on the defendants. The district court denied this motion, although it did not specifically refer to Rule 41(b).. The defendants appealed the district court's order to this court. However, the appeal was dismissed for lack of jurisdiction, as the district court's order was not appealable.

During the course of the proceedings, the district court denied the defendants' motion to stay the proceedings pending their appeal. In that order, the court informed the defendants that the case would proceed to trial on October 26, 1998. The district court case manager also notified Whitehorn and Komlose that the trial had been scheduled for October 26, 1998. Furthermore, in their "motion to vacate trial," the

defendants acknowledged that the trial had been scheduled for that date. The estate appeared for trial on the scheduled date, with its counsel and witnesses, but the defendants failed to appear. Therefore, the estate sought rescission of the transaction which had given rise to the lawsuit. Following an evidentiary hearing, the district court entered a default judgment against the defendants, and granted the plaintiff's request for rescission. It does not appear that the court provided the defendants with any prior notice of its intent to enter a default judgment.

The defendants have filed a timely appeal from the entry of the default judgment, essentially raising the following issues: 1) whether the district court erred when it entered default judgment against Whitehorn and Komlose; 2) whether the amended complaint superseded and supplanted the original complaint so as to void the original complaint; 3) whether Whitehorn and Komlose were properly served with the amended complaint; 4) whether Whitehorn and Komlose were entitled to a dismissal of the case pursuant to Rule 41(b); and 5) whether the district court's order denying the defendants' motion for summary judgment, but rejecting the plaintiffs' theory that the defendants did not execute the deed until after the decedent's death, barred the entry of default judgment against the defendants.

Initially, we note that a district court may sua sponte enter a default judgment under the circumstances of this case without providing prior notice to the defaulting party. *See, e.g., Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l,*

Inc., 982 F.2d 686, 692-93 (1st Cir. 1993) (Fed. R. Civ. P. 55(b)(2) notice requirement does not apply where there is no motion for default pending and where the court has, on its own motion, found a party to be in default for a failure to appear); *Ringgold Corp. v. Worrall*, 880 F.2d 1138, 1141-42 (9th Cir. 1989) (notice requirement does not apply where party is defaulted for failing to attend the first day of a trial scheduled months before); *Anilina Fabrique de Colorants v. Aakash Chem and Dyestuffs, Inc.*, 856 F.2d 873, 877 (7th Cir. 1988) (notice requirement does not apply where party is defaulted for defense counsel's and parties' failure to appear at a trial that had already commenced).

Upon review, we conclude that the district court properly entered default judgment for the defendants. A review of the record reflects that Whitehorn and Komlose were well aware of the scheduled trial date. During the course of the proceedings, the district court denied the defendants; motion to stay the proceedings pending their appeal. In that order, the court informed the defendants that the case would proceed to trial on October 26, 1998. The district court case manager also notified Whitehorn and Komlose that the trial had been scheduled for October 26, 1998. Furthermore, in their "motion to vacate trial," the defendants acknowledged that the trial had been scheduled for that date. The court had already placed the defendants on notice that failure to comply with the statutory and procedural rules governing the case could lead the court to impose sanctions on them. Nonetheless, Whitehorn and Komlose failed to provide any reasonable explanation for their failure to appear for trial. They explained that they did not appear for trial because they had sought to

stay the proceedings pending their appeal of the district court's order denying their motion to dismiss, however, the district court had already denied a similar motion, filed On October 2, 1998, as the order deny the motion to dismiss was not a final and appealable order.

The defendants' remaining arguments are also unpersuasive and do not warrant a remand for consideration by the district court. See Swaim v. Moltan Co., 73 F.3d 711, 717 n.3 (7th Cir. 1996) (court recognized that a direct appeal from default judgment could warrant a remand for resolution of disputed facts). First, the defendants' arguments, concerning the amended complaint and the plaintiffs' attorneys alleged failure to sign memoranda of law, do not speak to the issue of whether the district court properly entered default judgment against them. Second, a review of the record clearly reflects that the amended complaint refers to the earlier pleading and adopts it by reference. *See King v. Dogan*, 31 F.3d 355, 346 (5th Cir. 1994). Furthermore, the certificate of service for the amended complaint reflects that the plaintiffs properly served the defendants with the amended complaint. Moreover, the plaintiffs complied with Fed. R. Civ. P. 5, which requires that all papers filed after the complaint, that required to be served upon a party together with a certificate of service, shall be filed with the court within a reasonable time after service.

The defendants were also not entitled to relief pursuant to Fed. R. Civ. P. 41(b). Rule 11(a) provides, in pertinent part, that every pleading, written motion, and other paper shall be signed by at least one attorney of record. Here, the documents referred to by the defendants contain "sections" entitled memoranda of

law and facts; but the memoranda were not filed as separate documents. Counsel did sign each of the motions, as well as the certificates of service for these documents. The rule does not require that the attorney separately sign different sections of the motions.

Finally, the district court's order denying the defendants' motion for summary judgment, but rejecting the plaintiffs' theory that the defendants did not execute the deed until after the decedents death, did not finally dispose of the plaintiffs' claims, and thus did not bar a later ruling in favor of the plaintiffs. *See generally, J.Z.G. Resources, Inc. v. Shelby Ins. Co.*, 84 F.3d 211, 214 (6th Cir. 1996).

According, we affirm the district court's judgment. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
s/Leonard Green
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-6635

HUGH C. TURNER, JIM WHITEHORN, Co-executors of the Estate of Angula Wilson Whitehorn Turner,

Plaintiffs-Appellees,

vs.

JACK R. WHITEHORN and LOUIS R. KOMLOSE,

Defendants-Appellants.

ORDER

FILED FEBRUARY 28, 2000

Before: Jones, Batchelder, and Moore, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggest for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
s/Leonard Green
Leonard Green, Clerk